

EXHIBIT B

1 APPEARANCES CONTINUED:

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09:28:18 1 (The following proceedings were had in open court:)

09:28:18 2 THE CLERK: 09 C 7143, City of Livonia Employees'
09:28:32 3 Retirement System v. Boeing Company, et al., status, motion.

09:28:38 4 MR. MILLER: Good morning, your Honor; Marvin Miller
09:28:40 5 on behalf of plaintiff.

09:28:41 6 MR. EGLER: Good morning, your Honor; Thomas Egler on
09:28:43 7 behalf of plaintiffs.

09:28:44 8 MR. FILIP: Good morning, your Honor; Mark Filip on
09:28:46 9 behalf of the defendants.

09:28:47 10 MR. PRIMIS: Craig Primis from Kirkland & Ellis on
09:28:51 11 behalf of the defendants.

09:28:52 12 THE COURT: Good morning. This matter comes up on
09:28:54 13 the defendants' motion to certify an order for interlocutory
09:29:01 14 appeal.

09:29:04 15 I have read the defendants' two submissions and the
09:29:09 16 final submission and reviewed the key cases, but I didn't give
09:29:17 17 you an opportunity to make whatever oral remarks that each
09:29:22 18 side would like to make with regard to the motion because
09:29:24 19 these are not routine motions, as you know. The Court of
09:29:29 20 Appeals takes very few interlocutory appeals. It's really the
09:29:34 21 exception, not the general rule.

09:29:36 22 MR. FILIP: Yes, your Honor. My partner, Mr. Primis,
09:29:38 23 is going to speak to the issue.

09:29:40 24 MR. PRIMIS: Good morning. Thank you, your Honor.
09:29:42 25 Thank you for the opportunity to be heard.

09:29:43 1 As we set out in our papers which the Court has read,
09:29:47 2 we believe that this case presents a unique opportunity to
09:29:50 3 reconcile what we think is the tension between the
09:29:54 4 Higginbotham ruling and the Tellabs ruling, and specifically
09:29:57 5 the reason why we think it presents a good opportunity for a
09:30:01 6 1292 clarification is that the plaintiffs have taken the
09:30:05 7 position that Higginbotham is limited to its facts, and if
09:30:09 8 that is, in fact, the case, it represents a significant change
09:30:13 9 that the defendants do not believe is warranted in the law
09:30:16 10 governing confidential sources. The second -- so that's a
09:30:20 11 clean and control and legal issue we believe the Court of
09:30:23 12 Appeals can and should weigh in on.

09:30:25 13 And in addition, because this case is predicated on a
09:30:28 14 single confidential source that's not corroborated by other
09:30:32 15 confidential sources, we also believe that factually, it tests
09:30:35 16 the outer limits of what the Seventh Circuit would allow in
09:30:38 17 the context of a PSL or a case pleaded on the basis of
09:30:43 18 confidential sources.

09:30:43 19 And so for those two reasons, both the factual
09:30:46 20 context and the legal tension between two controlling
09:30:49 21 decisions, and the fact that the presence of the confidential
09:30:53 22 source allegations was the difference between dismissal on the
09:30:57 23 one hand in the first motion and survival in the second, that
09:31:01 24 this would be an appropriate case for 1292 review.

09:31:05 25 THE COURT: Well, is your position -- I just want to

09:31:08 1 make sure I understand your position. Is your position that
09:31:12 2 Higginbotham requires multiple confidential sources? Is there
09:31:19 3 a per se rule in your view established by Higginbotham?

09:31:22 4 MR. FILIP: No, the defendants --

09:31:23 5 THE COURT: Is it quantity rather than quality?

09:31:26 6 MR. FILIP: No, it's quality. We don't take the
09:31:28 7 position that there is a one confidential source rule. What
09:31:32 8 we do identify for the Court is that the context here is that
09:31:36 9 we do just have one confidential source. That doesn't make it
09:31:39 10 per se invalid under Higginbotham. But given all the concerns
09:31:43 11 about anonymity and the need for particularity that are
09:31:47 12 identified in Higginbotham, we do think that the presence of
09:31:50 13 just one source uncorroborated by others, which was the fact
09:31:54 14 that was present in both Higginbotham and Tellabs, that that
09:31:57 15 does test the outer bounds of where a confidential source can
09:32:01 16 help substantiate a complaint and we think pushes it much
09:32:04 17 closer into the Higginbotham camp.

09:32:06 18 Now, if Tellabs has had the dramatic effect that the
09:32:11 19 plaintiffs suggested, that is a legal issue that needs
09:32:13 20 clarification because this is a recurring issue. As the Court
09:32:15 21 has seen, many cases are pleaded on the basis of these
09:32:18 22 confidential sources now. And where defendants confront with
09:32:21 23 just one and it's unidentified and not corroborated, we do
09:32:25 24 think that tests the outer bounds.

09:32:27 25 Conceivably, there could be sufficient allegations

09:32:30 1 about one individual source that may be against past, but we
09:32:34 2 don't think that's been met here, and that's why we think to
09:32:38 3 the extent Higginbotham can be read that way, there is a
09:32:41 4 tension and conflict between Higginbotham and Tellabs.

09:32:44 5 THE COURT: Wasn't there a qualitative difference
09:32:48 6 between the confidential sources in Tellabs and Higginbotham?
09:32:55 7 You have a Brazilian subsidiary, and there wasn't anything
09:33:00 8 connecting the corporate headquarters in terms of knowledge,
09:33:07 9 what this Brazilian operation was doing that was fraud. They
09:33:14 10 certainly had access to records.

09:33:17 11 MR. PRIMIS: There was a difference between the
09:33:18 12 confidential sources in Higginbotham --

09:33:20 13 THE COURT: And their --

09:33:21 14 MR. PRIMIS: -- and Tellabs.

09:33:22 15 THE COURT: And their ability to provide reliable
09:33:25 16 information. My question is really was there a qualitative
09:33:31 17 difference between the confidential informants or sources in
09:33:36 18 Tellabs and Higginbotham, and does it make a difference or
09:33:40 19 not?

09:33:41 20 MR. PRIMIS: Well, certainly there was a difference.
09:33:46 21 In the Tellabs case, the Court of Appeals noted that there
09:33:49 22 were 26 confidential sources, and, significantly, they
09:33:51 23 provided detailed information and they corroborated one
09:33:53 24 another; whereas in the Higginbotham case, there was less
09:33:58 25 detail and there was no corroboration.

09:33:59 1 So the -- certainly there is a factual distinction
09:34:02 2 between those two cases, and our point is that if the -- and
09:34:06 3 we read them as just factually different cases. What's
09:34:10 4 happening here is the plaintiffs have essentially said
09:34:13 5 Higginbotham can only apply when you have a foreign subsidiary
09:34:17 6 with lack of detailed allegations about the sources and an
09:34:21 7 accounting issue, and that's limited to its facts. We don't
09:34:24 8 think Tellabs says that. To the extent Tellabs can or is
09:34:29 9 going to be read to say that, we think that's an important
09:34:32 10 issue that requires clarification because the allegations here
09:34:34 11 are very far from the 26 mutually corroborating sources that
09:34:38 12 were present in Tellabs, in fact, sufficient by 12(b)(6) by
09:34:44 13 the Court of Appeals.

09:34:44 14 So that's the issue that we think is framed out very
09:34:48 15 clearly here because the way the cases have been plead and the
09:34:50 16 two different rulings that we received depending on the
09:34:53 17 addition of the four new paragraphs in the third amended
09:34:56 18 complaint.

09:34:56 19 THE COURT: Thank you. Yes.

09:34:58 20 MR. EGLER: Thank you, your Honor.

09:35:02 21 The defendants continue to repeat that our argument
09:35:07 22 is that the law is different between Higginbotham and Tellabs,
09:35:11 23 but we have never made that argument, and I don't think the
09:35:16 24 Tellabs case makes that argument. The facts in Tellabs and
09:35:19 25 Higginbotham are very different. As your Honor pointed out in

09:35:23 1 Higginbotham, the issues related to a foreign subsidiary and
09:35:27 2 information that was alleged in the complaint from that
09:35:30 3 foreign subsidiary never tied the United States parent company
09:35:35 4 to any of the alleged fraud that was going on.

09:35:39 5 In the Tellabs case, the issues were that the Tellabs
09:35:42 6 product that was up was the company's main new product, and
09:35:46 7 the information that was alleged in the complaint in that case
09:35:50 8 was that the defendants -- the individual defendants and the
09:35:54 9 company itself were speaking about that product voluntarily,
09:35:57 10 made various statements about it. And the sources in that
09:36:00 11 complaint said that the information that was bad about that
09:36:05 12 product was known to the individual defendants.

09:36:09 13 So the facts with regard to Tellabs are very similar
09:36:12 14 to this case. The 787 was Boeing's largest, biggest, newest
09:36:18 15 product. The defendants chose to speak about it, and the
09:36:22 16 information that's alleged in this complaint, although it is
09:36:25 17 not alleged by multiple sources, is very straightforward and
09:36:29 18 very detailed. The information that's in this complaint names
09:36:34 19 specific documents that the individual defendants had access
09:36:37 20 to that the individual defendants saw via e-mail, so the
09:36:41 21 qualitative nature of the source is very important.

09:36:46 22 Now, I can understand the defendants' argument with
09:36:50 23 regard to the corroboration and their concerns that way, but
09:36:53 24 in this case also, after the class period was over, and the
09:37:03 25 defendants have admitted that they performed these various

09:37:05 1 tests that were undisclosed, so there is corroboration not by
09:37:09 2 independent sources, but by the defendants themselves. They
09:37:13 3 said that they had information earlier on but they did not
09:37:17 4 disclose it.

09:37:19 5 So we are not making the argument that Higginbotham
09:37:22 6 and Tellabs provide different law. This Court, as a matter of
09:37:28 7 fact, in its order cited both Higginbotham and Tellabs with
09:37:33 8 regard to the key issue, and we pointed out that in our
09:37:36 9 opposition brief, and the defendants don't respond and we
09:37:41 10 didn't reply. For a 1292 motion, it has to be a pure issue of
09:37:46 11 law. We are not saying that the law is different between the
09:37:48 12 cases. We are saying that the facts are. And the Seventh
09:37:51 13 Circuit said that the facts are different between Tellabs and
09:37:54 14 Higginbotham.

09:37:54 15 THE COURT: Well, one common point between the two
09:38:03 16 cases is that both Chief Judge Easterbrook and Judge Posner
09:38:10 17 were very critical of using unnamed sources, unidentified
09:38:17 18 sources, as the basis for scienter allegations in a security
09:38:23 19 fraud case. Both of them were.

09:38:27 20 MR. EGLER: Yes.

09:38:28 21 THE COURT: So you are taking an issue to the mat
09:38:30 22 about -- two things occur to me, and maybe these are naive
09:38:35 23 reactions, but I will tell you what I am thinking. One is
09:38:39 24 with the specificity of the allegations in the second amended
09:38:43 25 complaint, it's difficult for me to understand how Boeing

09:38:46 1 doesn't know who the confidential source is.

09:38:49 2 Second of all, why didn't the plaintiffs just name
09:38:55 3 that person? I mean, I know you're taking this case to the
09:38:59 4 mat, and I know Mr. Miller was involved in Tellabs, and a lot
09:39:05 5 -- he has had a lot of cases with me. It seems to me you're
09:39:09 6 inviting this trench warfare over pleadings by not identifying
09:39:17 7 the source.

09:39:17 8 MR. EGLER: It's our experience in the industry, your
09:39:21 9 Honor, that it is very difficult to get information from
09:39:27 10 people when you tell them that their name will be placed on a
09:39:30 11 complaint.

09:39:31 12 With regard to post-pleading motions, we are not
09:39:35 13 saying that the defendants will not get this person's name.
09:39:40 14 In fact, I think you read their papers right. I don't want to
09:39:43 15 put words in their mouth, but I think they do know who this
09:39:47 16 individual is. His direct supervisor is named in the
09:39:50 17 complaint, his place of work is named in the complaint, and
09:39:55 18 his name has been put in our initial disclosures. We have had
09:39:59 19 various conversations with the defendants since the Court
09:40:03 20 denied the motion to dismiss, and they have never asked us for
09:40:06 21 this person's name. I think -- and they never really say in
09:40:10 22 their papers that they don't know who he is. They just say he
09:40:12 23 hasn't been disclosed.

09:40:14 24 So the defendants know who he is, and to the extent
09:40:18 25 they don't know who he is, they can ask us and we will tell

09:40:22 1 them.

09:40:22 2 With regard to our procedures, we think the law has
09:40:26 3 been developed that we are entitled to not name the individual
09:40:30 4 on the complaint. If they cooperate with us at the pleading
09:40:33 5 standards, we can promise them anonymity in the pleading
09:40:37 6 documents with the condition that their name will be released
09:40:40 7 later.

09:40:41 8 I think in this case, we have gone into great detail
09:40:45 9 about who this person is, what their basis for speaking -- or
09:40:50 10 what their basis for the facts conveyed in the complaint are,
09:40:54 11 and now that the motion to dismiss has been denied, we will
09:41:00 12 turn over the name. And I think the Seventh Circuit in
09:41:04 13 Tellabs affirmed that process. I understand that there has to
09:41:09 14 be -- they make some comment about a certain discount that has
09:41:12 15 to be given to them. I think when you look at --

09:41:15 16 THE COURT: Steep discounts.

09:41:16 17 MR. EGLER: But when you look at the other facts that
09:41:18 18 are alleged in the complaint, where this person worked, what
09:41:21 19 the bases were for the allegations, I think it's very
09:41:25 20 straightforward.

09:41:25 21 Now, if the Court is going to set a standard with
09:41:31 22 regard to pleadings, we will examine it and we will look at
09:41:33 23 it, but I can tell you that the reason we did not name, we did
09:41:37 24 everything but name, but the reason we did not name our source
09:41:41 25 is because when we engage sources, we find that they are much

09:41:46 1 more cooperative if we tell them we will give them the
09:41:50 2 anonymity in the pleading process.

09:41:53 3 THE COURT: Yes.

09:41:53 4 MR. PRIMIS: May I just have a brief response, your
09:41:55 5 Honor?

09:41:56 6 THE COURT: Yes.

09:41:56 7 MR. PRIMIS: The defendants do not know who the
09:41:58 8 confidential source is. We have suspicions about who it might
09:42:01 9 be. We received a list of 225 people on a set of initial
09:42:07 10 disclosures. We cannot tell who that -- who the person is
09:42:11 11 from that list. He is apparently buried in there. There are
09:42:14 12 sufficient errors in what that person said, which obviously we
09:42:18 13 would not put into a 12(b)(6) response, that causes concern
09:42:22 14 that the person was not at Boeing during the time alleged,
09:42:26 15 which is why we had the second part of our motion, which is to
09:42:30 16 adopt a procedure similar to what the Second Circuit
09:42:34 17 authorized in Campo to do a quick check on the bona fides of
09:42:38 18 the confidential source before leaving 12(b)(6) because as
09:42:43 19 best we can tell, this may be a person, may be a person, who
09:42:47 20 is receiving information secondhand from others who that
09:42:50 21 person knew at Boeing and is filling in the blanks because
09:42:53 22 they used to work there.

09:42:55 23 And so that's the best we can tell right now, and we
09:42:58 24 haven't been able to define it from what plaintiffs have
09:43:02 25 informed us. And so that was the alternative form of the

09:43:04 1 relief that we requested in our motion, but we do think that
09:43:07 2 this is testing the outer limits of what's permissible here.

09:43:10 3 THE COURT: Let me clarify something with plaintiffs'
09:43:14 4 counsel. I didn't understand that the confidential source
09:43:23 5 wasn't at Boeing during the events alleged in the complaint.

09:43:30 6 MR. EGLER: The confidential source, to my knowledge,
09:43:32 7 did not work at Boeing during the class period. He started
09:43:36 8 working there within months of that.

09:43:41 9 THE COURT: Months of what?

09:43:42 10 MR. EGLER: He started working there right after the
09:43:44 11 class period. And as the complaint says, as part of his work,
09:43:51 12 he was given access to files that were prepared during the
09:43:54 13 class period, and those are the documents that he saw.

09:44:00 14 So unlike at Higginbotham and Tellabs where the
09:44:05 15 information from the confidential source was about what
09:44:08 16 somebody told somebody else and what the witnesses heard that
09:44:12 17 the defendants heard, in this case, the entire process relates
09:44:18 18 to documents. This witness saw documents that were prepared
09:44:24 19 during the class period and delivered to the defendants. We
09:44:28 20 did not represent in the complaint that he worked there during
09:44:31 21 the class period. We represented that he saw e-mails from the
09:44:37 22 class period that went to the defendants.

09:44:43 23 THE COURT: All right. Anything further?

09:44:46 24 MR. EGLER: The only thing I would note, your Honor,
09:44:48 25 is that the defendants also raised this issue about the Campo

09:44:52 1 case in the back half of their motion with regard to taking
09:44:56 2 depositions, and I would note that in the Campo case in the
09:45:00 3 district court, and this is left unnoted in the Court of
09:45:04 4 Appeals' decision, that discovery with regard to the witnesses
09:45:07 5 went both ways, and I think in this case, it's important that
09:45:11 6 that happen. To the extent the defendants are raising the
09:45:16 7 credibility issues with regard to the witness, his sole
09:45:20 8 conveyance of information is about documents that the
09:45:23 9 defendants had seen.

09:45:26 10 In the Campo case, and I have a minute order printed
09:45:29 11 from the district court docket, the judge allowed the
09:45:34 12 defendants to take discovery and allowed the plaintiffs to
09:45:37 13 take discovery. And I think in this case, the appropriate
09:45:41 14 thing to do, to the extent the Court is going to do anything,
09:45:43 15 is to proceed and have the defendants produce the documents
09:45:48 16 that are specifically discussed in the complaint.

09:45:56 17 MR. PRIMIS: Your Honor, the admission by counsel
09:46:00 18 that the confidential source was not working at Boeing during
09:46:03 19 the class period when the testing in question was being done
09:46:07 20 in our view is a significant admission that was not known to
09:46:10 21 us at the time of the 12(b)(6) briefing. We raised it as a
09:46:14 22 concern in our motion to dismiss, that the complaint was
09:46:17 23 artfully pleaded so as to disguise when or whether the person
09:46:21 24 actually worked at Boeing, and we don't know if that person is
09:46:24 25 even working at Boeing now.

09:46:26 1 So this underscores the significance of the points
09:46:29 2 that we are making in support of a 1292(b) because we have a
09:46:33 3 confidential source who wasn't at the company at the time and
09:46:37 4 it walks right into the Higginbotham point about steeply
09:46:41 5 discounting these witnesses. Now we have a single
09:46:45 6 uncorroborated source who wasn't there during the class
09:46:47 7 period. That's an additional factual wrinkle which strongly
09:46:51 8 supports even further -- which strongly supports further
09:46:56 9 additional review of the standards that are going to cover
09:47:00 10 confidential sources in this circuit.

09:47:01 11 THE COURT: All right. Anything further?

09:47:04 12 MR. EGLER: I would just point out, your Honor, that
09:47:06 13 this is not anything new. We did not represent that the
09:47:11 14 witness worked there. We represented that he had seen these
09:47:14 15 documents, and his credibility is not reduced because he did
09:47:17 16 not work there. He said that he worked at Boeing and that he
09:47:22 17 had seen these documents. When he saw them isn't an issue.
09:47:26 18 It does not reduce his credibility. These documents stand for
09:47:30 19 themselves, and they point to the witness' credibility, but if
09:47:34 20 the documents exist, they are the issues that prove the case,
09:47:39 21 not the witness himself.

09:47:44 22 THE COURT: Well, when I dismissed the second amended
09:47:49 23 complaint last May, there was a rather extensive memorandum
09:48:02 24 opinion that went into the background and history of the
09:48:07 25 events that are the subject of the case. That was the

09:48:14 1 development of Boeing's 787 Dreamliner and the events in
09:48:23 2 spring of 2008, was it not?

09:48:31 3 MR. EGLER: 2009.

09:48:32 4 THE COURT: 2009, concerning two aspects, two
09:48:41 5 detailed allegations concerning two aspects at the heart of
09:48:45 6 the alleged fraud. One was the press releases and actions by
09:48:55 7 Boeing to induce consumer and investor confidence, and,
09:49:05 8 indeed, those public announcements did trigger presales of
09:49:12 9 this jumbo jet, as well as investors such as the pension fund
09:49:18 10 that is the lead plaintiff in this case.

09:49:23 11 The other aspect that's pleaded with detail and was
09:49:28 12 pleaded with detail in the second amended complaint was the
09:49:31 13 stress test results and the postponement of the first flight
09:49:38 14 because of structural and/or design problems of the aircraft,
09:49:50 15 which were not disclosed in the public statements, including
09:49:53 16 statements at the Paris air show in I believe it was May 2009.

09:50:01 17 In any event, the case was dismissed in May without
09:50:07 18 prejudice because under the high pleading standards of the
09:50:14 19 Private Securities Litigation Reform Act, there wasn't
09:50:19 20 sufficient -- there were not sufficient allegations of
09:50:24 21 scienter or knowledge by Boeing and the two corporate
09:50:29 22 officials named as defendants. There were some allegations
09:50:32 23 pertaining to a confidential source that were vague --
09:50:40 24 actually, I think I used the word murky in terms of describing
09:50:44 25 some of the test results -- so the complaint was dismissed

09:50:50 1 without prejudice.

09:50:55 2 With respect to the second amended complaint, the
09:50:59 3 plaintiffs added some allegations that the defendants
09:51:04 4 characterize them as just a few paragraphs, but those just a
09:51:10 5 few paragraphs are detailed, and I am looking at paragraph 139
09:51:22 6 on page 45 and the paragraphs that follow to page 47,
09:51:30 7 paragraph 142. And they allege that plaintiffs' confidential
09:51:39 8 source is a former Boeing senior structural analyst engineer
09:51:44 9 and chief engineer who worked on the mid-body fuselage, wing
09:51:49 10 integration team for the 787 program. The confidential
09:51:56 11 source's job responsibilities, including stress and design
09:52:00 12 review of the 787 wing joints, as well as performing finite
09:52:06 13 element modeling analysis for other engineers and designers
09:52:10 14 working on the 787 wing project. The confidential source
09:52:16 15 reported to Larry Hall, Boeing's vice president of the wing
09:52:20 16 body integration team. As part of the confidential source's
09:52:26 17 job, he had direct access to, as well as firsthand knowledge
09:52:31 18 of, the contents of Boeing's 787 stress test files that
09:52:40 19 immortalized the results of the failed 787 wing limit load
09:52:44 20 test and subsequent retest which transpired on April 21, 2009,
09:52:50 21 and May 17, 2009.

09:52:58 22 Based on the confidential source's firsthand
09:53:02 23 knowledge of -- his firsthand knowledge, Boeing's wing test
09:53:09 24 files are an organized set of documents in Boeing's direct
09:53:14 25 control that contain the wing test technical results, internal

09:53:24 1 communications among the engineers who participated in
09:53:26 2 conducting the wing tests, and the internal communications of
09:53:29 3 the wing integration team's management concerning the results
09:53:34 4 of those tests. According to the confidential source, the
09:53:39 5 wing tests files include internal contemporaneous
09:53:44 6 communications regarding the specific results of the wing
09:53:49 7 tests and findings of the wing test integration team which the
09:53:54 8 wing test integration team sent directly to defendants
09:53:58 9 McNerney and Carson, the two named defendants in this case.

09:54:03 10 According to the confidential source, the wing
09:54:06 11 integration team included Larry Hall, Terry Pham, P-h-a-m, who
09:54:15 12 reported directly to Larry Hall, and Mike Stanton (phonetic),
09:54:18 13 vice president of engineering for the 787 program, who
09:54:23 14 reported directly to defendant Carson. According to the
09:54:26 15 firsthand knowledge of the confidential source, the April
09:54:31 16 21st, 2009, load test file, which is in Boeing's direct
09:54:36 17 control, indicates that the 787 wing structure failed at 30
09:54:42 18 percent below limit load.

09:54:44 19 Further, according to the confidential source, the
09:54:47 20 April 21st, 2009, wing test file contained copies of internal
09:54:53 21 electronic communications to defendants McNerney and Carson
09:55:00 22 which were dated within a few days after April 21st, 2009,
09:55:06 23 informing defendants that the 787's wing had failed at limit
09:55:13 24 load and, as a result of that failed test, retesting of the
09:55:19 25 787 wing assembly would be necessary.

09:55:23 1 According to the confidential source, the contents of
09:55:26 2 the April 21st, 2009, wing test file, including the
09:55:32 3 contemporaneous communications from the wing integration team
09:55:36 4 to defendants McNerney and Carson, are clear in the finding
09:55:42 5 that the failed April 21st, 2009, limit load test and
09:55:47 6 necessary retesting placed the plane's scheduled June 30,
09:55:54 7 2009, first flight at risk.

09:55:56 8 According to the confidential source, the May 17,
09:56:01 9 2009, wing test file indicates that the 787 passed the limit
09:56:08 10 load test on May 17, 2009, but failed the ultimate load test
09:56:13 11 at about 125 percent of the limit load. According to the
09:56:20 12 confidential source, the fact that the 787 wing failed at 125
09:56:26 13 percent of limit load was generally known by the wing
09:56:30 14 integration team immediately upon completion of the May 17,
09:56:35 15 2009, test and was characterized by the wing test file
09:56:42 16 documents as a weight optimism issue -- I'm sorry, weight
09:56:48 17 optimization issue.

09:56:50 18 Further, according to the confidential source, the
09:56:52 19 May 17, 2009, wing test file contains detailed analysis
09:56:58 20 evidencing that nine days after the failed May 17, 2009, test,
09:57:05 21 delamination of the 787 wing stringers was also identified as
09:57:10 22 a serious engineering issue. According to the confidential
09:57:15 23 source, the May 17, 2009, wing test file contains copies of
09:57:25 24 electronic internal communications dated around May 26, 2009,
09:57:31 25 from the wing integration team to defendants McNerney and

09:57:34 1 Carson which specifically informed defendants McNerney and
09:57:40 2 Carson that the 787 wing failed the ultimate load test, as
09:57:44 3 well as the fact that additional rework of the wing attachment
09:57:48 4 design was required to correct the delamination problem.

09:57:53 5 These late May 2009 contemporaneous communications
09:57:57 6 contained in the May 17, 2009, test file from the wing
09:58:03 7 integration team to defendants McNerney and Carson clearly
09:58:07 8 communicated the wing integration team's conclusion that
09:58:10 9 Boeing would be unable to conduct a June 30, 2009, first
09:58:16 10 flight.

09:58:17 11 Now, these are not general allegations, they are not
09:58:24 12 speculative allegations, and they are not vague allegations,
09:58:30 13 unlike a number of the cases that were cited in the plaintiffs
09:58:38 14 on page 1 of 6. These are very specific, and if I may use the
09:58:43 15 word cogent, allegations. They connect between the general
09:58:51 16 allegations which are pretty specific in plaintiffs' 59-page
09:58:58 17 complaint about Boeing's behavior in the marketplace versus
09:59:08 18 what was happening internally.

09:59:13 19 Given these additional allegations, I found at the
09:59:20 20 time plaintiffs sought to file the second amended complaint,
09:59:23 21 as I find now, that a reasonable person could draw a strong
09:59:31 22 inference that Boeing and the two named defendants knew the
09:59:39 23 situation with respect to testing, retesting issues and first
09:59:44 24 flight information concerning the 787 at the time public
09:59:52 25 statements were made that did not reveal this information and

09:59:57 1 could allegedly be used in a misleading or unintending file.

10:00:06 2 So the characterization made -- characterizations
10:00:12 3 made repeatedly in the motion for a certification order to the
10:00:18 4 Seventh Circuit do not capture, do not capture the realities
10:00:23 5 of the second amended complaint and instead focus on a theory
10:00:39 6 that two decisions, one by the chief judge, Chief Judge
10:00:47 7 Easterbrook, the other by Judge Posner, are at odds with each
10:00:51 8 other, which isn't something that has anything to do with any
10:00:55 9 of my findings and is premised on, I don't think -- I don't
10:01:06 10 think the characterization is premised on a careful
10:01:09 11 consideration of those two opinions that involve qualitative
10:01:13 12 differences between the confidential informants.

10:01:17 13 Neither of those opinions, Higginbotham and Tellabs,
10:01:22 14 encourage, let's say, the use of confidential sources in
10:01:28 15 Private Securities Litigation Reform Act complaints. Quite
10:01:33 16 the contrary. They are problematic. But the basis of the
10:01:39 17 confidential source's information in the context of the whole
10:01:44 18 complaint and whether or not the confidential informant was in
10:01:53 19 a position to know the things that are alleged is critical,
10:01:58 20 and it appears that the confidential source in the second
10:02:02 21 amended complaint had personal knowledge of the documents that
10:02:07 22 point to the knowledge by officials of the company, including
10:02:14 23 the two named individual defendants.

10:02:18 24 So I don't find that the ruling denying the motion to
10:02:24 25 dismiss the second amended complaint is predicated on a

10:02:29 1 controlling issue of law. To say that somehow my denying the
10:02:37 2 motion to dismiss, the Court was relying on Tellabs and
10:02:44 3 undercutting the holding of Higginbotham is not even -- was
10:02:52 4 not even on the table, not even a consideration. It was the
10:02:56 5 sufficiency under the standards articulated in both those
10:03:02 6 cases that predicated the ruling, and I don't think it's a
10:03:06 7 fair reading of Higginbotham to say that, well, you can't --
10:03:14 8 you can never base a securities fraud claim, a federal
10:03:20 9 securities fraud claim, on the allegations of a confidential
10:03:26 10 source no matter what the circumstances or you have to have a
10:03:32 11 whole army of them, of confidential sources, you can't use
10:03:39 12 just one, some sort of a per se bright-line sort of thing.
10:03:43 13 Neither of those cases suggest that. It's a qualitative
10:03:47 14 examination of the basis for the allegations and the
10:03:51 15 particularity of the allegations concerning the confidential
10:03:55 16 source's information.

10:03:57 17 Yes, my job would sure be easier if the confidential
10:04:01 18 source were named, but in some ways, I think this is much ado
10:04:08 19 about nothing because their 26(a)(1) disclosures should reveal
10:04:15 20 who this is, discovery should reveal who this is, and we don't
10:04:18 21 need special discovery rules to do it.

10:04:20 22 But I don't find that there is a controlling issue of
10:04:23 23 law at stake in denying the motion to dismiss, nor do I think
10:04:31 24 there is a substantial ground for a difference of opinions as
10:04:35 25 to the applicability of the Higginbotham and Tellabs case.

10:04:41 1 As far as whether an interlocutory appeal would
10:04:50 2 result in materially advancing this case or conserving
10:04:55 3 judicial resources, I find that it would not. It would delay
10:05:00 4 the case and put another layer on this litigation, and so I do
10:05:08 5 not find there is a basis for certifying this poorly issued --
10:05:20 6 to me, it's not an issue about an intracircuit dispute
10:05:26 7 concerning the use of confidential sources under the federal
10:05:32 8 securities laws.

10:05:36 9 So the motion is denied.

10:05:38 10 And moving on to the text question, I had asked that
10:05:43 11 you submit your discovery plan to chambers by last Thursday,
10:05:49 12 and I didn't receive anything. Was anything submitted?

10:05:52 13 MR. MILLER: Your Honor, we submitted that through
10:05:55 14 your proposed order procedure on Thursday.

10:05:58 15 THE COURT: Oh, I never saw it.

10:06:01 16 MR. EGLER: I apologize, your Honor. I have a copy
10:06:03 17 of it here if I can hand it up.

10:06:05 18 THE COURT: We don't search the e-mails. I really
10:06:09 19 appreciate courtesy copies. The amount of paper, we must have
10:06:18 20 incurred a hundred motions in the last week. Unfortunately, I
10:06:21 21 haven't had a chance to read it.

10:06:24 22 MR. FILIP: Judge, we -- just to preview, I think
10:06:28 23 there's a huge amount of agreement in there. There's perhaps
10:06:32 24 two or perhaps three disagreements. One concerns the number
10:06:36 25 of interrogatories. The parties disagree on that. One

10:06:41 1 concerns the number of depositions, the parties disagree on
10:06:43 2 that. And perhaps there is a third. I don't know.

10:06:45 3 MR. EGLER: Well, no, the other one was just the
10:06:48 4 discovery cutoff, and that was taken care of.

10:06:51 5 MR. MILLER: I think, your Honor, we proposed a
10:06:53 6 pretty aggressive -- an agreed-upon pretty aggressive schedule
10:06:58 7 where everything would conclude pretty much --

10:07:00 8 THE COURT: Well, I am trying not to rule on things I
10:07:03 9 haven't read, so I will look at it after I finish in court
10:07:07 10 today, and if I have any questions, I will be calling you in
10:07:13 11 again. If it's pretty clear, the choices are pretty clear, up
10:07:17 12 or down, I will just issue an order.

10:07:21 13 MR. FILIP: Sorry about that.

10:07:22 14 MR. EGLER: If I may suggest, your Honor --

10:07:23 15 THE COURT: That's why we say courtesy copy.

10:07:25 16 MR. EGLER: I apologize.

10:07:26 17 THE COURT: I know that that's done, but we have --
10:07:33 18 we still do the courtesy copy thing and try, when we have a
10:07:38 19 case up for status, try to -- I try to read everything that
10:07:44 20 comes in, and generally I do, except where it comes in under
10:07:47 21 the radar, our radar screen, not yours, our radar screen. I'm
10:07:54 22 sorry that I am not prepared to rule on this.

10:07:58 23 But there is no stay on discovery. I mean, it was
10:08:02 24 certainly discussed in the briefs on the interlocutory appeal
10:08:07 25 issue. And in terms of deposing whoever you want to depose

10:08:13 1 and finding out what's in those files, it seems to me the case
10:08:21 2 -- the plaintiffs' case might rise or fall, depending on what
10:08:28 3 are in these wing stress test files --

10:08:30 4 MR. EGLER: Plaintiffs agree, your Honor.

10:08:32 5 THE COURT: -- and the communications. You will know
10:08:35 6 right away whether the confidential source was correct or not.

10:08:42 7 MR. EGLER: If I may say so, your Honor, I agree with
10:08:47 8 defense counsel that the two -- the only two issues that are
10:08:53 9 -- that we disagree about are the depositions and the
10:08:56 10 interrogatories. And we say that there should be 20
10:08:59 11 depositions and the defendants say 13. We say there should be
10:09:03 12 35 interrogatories, and the defendants say 20. And it goes to
10:09:07 13 the perceived complexity of the case and the number of
10:09:09 14 witnesses called for each side. Those are the two remaining
10:09:12 15 issues.

10:09:13 16 THE COURT: All right. I will take a look at those.

10:09:15 17 MR. EGLER: Thank you, your Honor.

10:09:16 18 MR. PRIMIS: Thank you, your Honor.

10:09:17 19 MR. FILIP: Thank you, your Honor. Have a nice day.
10:09:19 20 Thank you for your ruling.

10:09:20 21 THE COURT: Thank you.

22 (Which were all the proceedings had in the above-entitled
23 cause on the day and date aforesaid.)

24

25

1 I certify that the foregoing is a correct transcript from
2 the record of proceedings in the above-entitled matter.

3 _____
4 Carolyn R. Cox
5 Official Court Reporter
6 Northern District of Illinois

Date

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/s/Carolyn R. Cox, CSR, RPR, CRR

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